Mr. Sivanesan (DW5). He testified that RISDA is the owner of 21 estates and Ulu Keratong 3 is one of them. RISDA holds licence No. 0631 and kept at their Ampang Head Office. He said in November 1982 Estate Pekebun Kecil (plaintiff) had a licence to sell oil palm FFB in these 21 estates - including Ulu Keratong 3. I accept DW5's evidence that the plaintiffs had a licence to trade in oil palm fruits.

My decision is on the totality of the evidence adduced I believed and accept the claim of the plaintiffs as genuine and it was not in anyway affected by the alleged counterclaim. I enter judgment for the plaintiffs with costs to be taxed and also allow the plaintiff's costs on the dismissed counterclaim as prayed.

LIM CHUAN CHENG

v.

TOU SII KEH

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[SUIT NO. 46 OF 1985]
18 JANUARY 1993

CONTRACT: Development agreement - Breach by defendant - Non-compliance with time limits prescribed by agreement - Waiver by plaintiff - Time subsequently made of the essence of the contract - Non-compliance with new time limits by defendant - Rescission of agreement after notice by plaintiff - Whether notice reasonable - Whether rescission valid - Whether plaintiff entitled to recover damages for breach of agreement.

The plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to convey to the defendant at least 2 units of shophouses to be built on the subdivided lots mutated from the land owned by the plaintiff in return for which the defendant agreed to develop the said land in accordance with the covenants and conditions contained in the agreement.

One of the conditions was that the defendant was to get approval for the subdivision of the land from the Lands & Surveys, Sibu. The application for subdivision was approved in principle around 25 February 1981, but it was only in relation to 4 units of 3 storey shophouses instead of 4 units of 4 storey shophouses contemplated in the agreement.

Consequently the plaintiff and the defendant entered into a supplementary agreement on 19 June 1981 whereby the defendant agreed, *inter alia*, to obtain approval of the relevant building and engineering plans within 5 months from the said date.

On the defendants failure to comply with the said terms, the plaintiff on 13 September 1984 gave 3 months notice to the defendant requiring compliance and after the lapse of the notice period rescinded the agreement and claimed damages.

The defendant disputed the validity of the rescission contending that by his acts the plaintiff had waived any reliance on the time frame provided for under the supplementary agreement.

Held:

[1] The series of actions taken by the plaintiff between 18 February 1983 and 13 September 1984 must have the effect of estopping him from invoking and relying upon the time restriction provisions in the supplementary agreement.

[2] The defendant was a building draftsman at all material times and would be familiar with the procedures and time factors involved in such projects. A period of about 42 months had lapsed between the date of execution of the supplementary agreement and the date of rescission. Notwithstanding this the defendant had not responded positively and had persisted in the delays.

[3] In the light of these factors the 3 month notice issued by the plaintiff to the defendant was a reasonable one in all the circumstances.

[4] The development agreement and the supplementary agreement entered into between the plaintiff and the defendant had been lawfully and validly rescinded.

[Judgment for the plaintiff. Defendant's counterclaim dismissed with costs].

Cases referred to:

Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading [1972] 1 MLJ 21 ***(foll)***

Webb v. Hughes [1870] LR 10 281 at p. 286 ***(foll)***

Wong Kup Sing v. Jeram Rubber Estate Ltd. [1969] 1 MLJ 245 ***(foll)***

Charles Richards Ltd. v. Oppenheim [1950] 1 All ER 420 ***(foll)***

Other source referred to:

Halsbury's Laws of England, Hailsham Edn., Vol. 3, pp. 220 - 222

For the plaintiff - Bexter A. Michael; M/s. Ee & Lim
Defendant in person

JUDGMENT

Steve Shim Lip Kiong J:

By virtue of a development agreement dated 26 September 1979 exhibited on p. 4 of the bundle of documents, entered into between the plaintiff and the defendant, in consideration of the plaintiff agreeing to convey to the defendant at least two units of shophouses to be built on the subdivided lots to be mutated from the land owned by the plaintiff, the defendant agreed to develop the said land in accordance with the covenants and conditions therein contained. Under the terms of the development agreement, it was the defendant's obligation and at his costs to *inter alia* earthfill the land; apply to the Lands & Surveys, Sibu, for subdivision of the land; cause to be prepared architectural plans, elevation and engineering drawings for submission to the Sibu Urban District Council for approval; construct infrastructure on the land; connect water and electricity supplies from the mains to the land; construct at least 4 units of 4-storey shophouses on the land and complete the construction of the shophouses allotted to the plaintiff in accordance with the approved building plans and drawings within 18 months from the date of approval of such plans and drawings. It was not in dispute that the defendant had submitted the application for subdivision of the land which was approved in principle by the Lands & Surveys, Sibu, on or about 25 February 1981. This is reflected in the approval letter of the same date, exhibited on p. 11 of the bundle of documents.

Now, there are conflicting versions as to what followed after receipt of the approval letter dated 25 February 1981 from the Lands & Surveys. It is the plaintiff's case that the defendant did not do anything thereafter; that the defendant was more concerned or involved in applying for the approval of an additional unit of shophouse to the Lands & Surveys; that although the plaintiff was prepared to hand over possession of his land to the defendant so that construction could begin, the latter had refused to take up the offer as he was then more intent on applying for approval of the additional unit in question. The defendant has however alleged that the plaintiff had flatly refused to accept the approval in principle granted by the Lands & Surveys on 25 February 1981 since it related only to the approval of 4 units of 3-storey shophouses and not 4 units of 4-storey shophouses envisaged in the development agreement of 26 September 1979.

It is, I think, quite conceivable, on the evidence, that both parties were not particularly happy with the approval in principle *vide* the letter dated 25 February 1981 granted by the Lands & Surveys because the said approval was only in relation to 4 units of 3-storey shophouses instead of the 4 units of 4-storey shophouses contemplated or agreed upon in the development agreement. Under the said agreement, the plaintiff was entitled to 2 units of 4-storey shophouses which meant in effect that under the approval given by Lands & Surveys, he would stand to

profit less financially because the value of a 3-storey shophouse would obviously be less than that of a 4-storey shophouse. By the same token, the defendant would also gain less financially. In the circumstances, it is not inconceivable to accept that the plaintiff might have been hesitant in accepting the approval in principle granted by the Lands & Surveys and thus prompting him to delay, if not refuse initially at least, to hand over possession of his land to the defendant. However, the plaintiff must have accepted or be deemed to have accepted the position subsequently because he then proceeded to enter into a supplementary agreement with the defendant though upon modified terms and conditions. This is exhibited on p. 12 of the bundle of documents. It is also not incredulous, by reason of the difference in value between a 4-storey shophouse and a 3-storey shophouse as I have said, to accept the proposition that the defendant had applied for approval of the additional unit of shophouse in order to off-set the excessive construction costs which he might have had to incur.

There is sufficient evidence to indicate or suggest that the defendant, after receiving the approval letter dated 25 February 1981 from the Lands & Surveys, had continued in his attempt to apply for an additional unit of shophouse thereby exhibiting, it seems to me, an attitude of unconcern by any refusal which might have emanated from the plaintiff at the material time. In short, it could be said that by his conduct in applying for the additional unit of shophouse, he would have completely forsaken or abandoned any reliance he might otherwise have had on any refusal on the part of the plaintiff to accept the approval granted by the Lands & Surveys. Such refusal, if any, would have been dissipated by the defendant's own preoccupation or concern in applying or attempting to apply for the additional unit, as I have mentioned.

The defendant has alleged that the plaintiff was in breach of clause 3(5) of the development agreement of 26 September 1979 in failing and or refusing to deliver possession of his land to him within 2 months from the date of the letter dated 25 February 1981 granting approval in principle for the subdivision of the said land by the Lands & Surveys. The plaintiff has countered by stating that neither the said letter nor the contents therein were made known to him until months after the defendant's receipt of the letter. This has not been denied or disputed by the defendant either in cross-examination or in his own testimony. This is perhaps not surprising since, on his own admission, the defendant has testified that he did not extend any of the documents he wrote to and/or received from the authorities, to the plaintiff. The plaintiff was apparently kept in the dark. Hence, he could not possibly be expected to know the up-to-date progress of the transactions between the defendant and the relevant authorities. Here, it was clear that the defendant did not draw the matter of the approval to the plaintiff's attention, either verbally or in writing, immediately upon or very soon after receipt of the letter dated 25 February 1981 from the Lands & Surveys. There is some evidence to suggest that the plaintiff came to know of the approval when he went to the Lands & Surveys to check on the progress of the project. It would mean therefore that the alleged breach of clause 3(5) in question resulted in part at least from the defendant's negligent and or wilful conduct in withholding or delaying relevant information from the plaintiff, in this case, information relating to the letter dated 25 February 1981 from the Lands & Surveys granting approval in principle for the subdivision of his land. In any event, notwithstanding the alleged breach, the defendant nevertheless proceeded to enter into a supplementary agreement with the plaintiff on 19 June 1981. By his actions therefore, the defendant must be regarded as having contributed to or condoned the plaintiff's delay, if any, and would be estopped from invoking and relying upon the provisions of clause 3(5) aforesaid. This I so hold.

Here the plaintiff and the defendant had entered into a supplementary agreement on 19 June 1981 which had modified some of the terms and conditions of the development agreement they made on 26 September 1979. Under the supplementary agreement, the defendant, amongst other things, undertook;

(i) to carry out the conditions stipulated in the approval letter dated 25 February 1981 from the Lands & Surveys,

(ii) to submit to the Lands & Surveys, application for subdivision of the plaintiff's land, all relevant building and engineering plans and to obtain approval of the same within 5 months from the date of the said agreement and

(iii) to complete all constructions within a period of 15 months from date of approval of

all building plans failing which liquidated damages at the rate of RM1,500 for each unit of shophouse allotted to the plaintiff left uncompleted for each month or part thereof, shall be payable by the defendant to the plaintiff.

It should be noted that the power of attorney was executed on the same date, that is to say, on 19 June 1981, by the plaintiff in favour of the defendant. This is reflected in exhibit D1. This power of attorney was subsequently registered with the Sibu Land Registry Office on 9 October 1981. Undoubtedly, the defendant had been quite active in the wake of the supplementary agreement. He submitted the relevant building and engineering plans to the various authorities for consideration but unfortunately they were not approved and this situation persisted for a long time. Up to January 1983, long after the expiry of the 5 months period envisaged in the supplementary agreement, no such approval was in sight. As a result, the plaintiff, obviously in some desperation, wrote to the defendant on 8 January 1983 drawing attention to the delays and warning of possible legal action against the defendant. The letter which is exhibited on p. 17 of the bundle of documents states:

Dear Sir,

Re: Development project in respect of my parcel of land situate at 27, Lanang Road, Sibu

Under our development agreement dated 26 September 1979 and the supplementary agreement dated 19 June 1981, you have NOT complied with the essential terms and I would like to direct your urgent attention to this matter as well as the following relevant clauses:

Development Agreement: Clause 1(b) and (c); 8 and 10
Supplementary Agreement: Clause 2; 3 and 4

Please note I have on my part executed the power of attorney in your favour in accordance with the above agreements: reference Sibu Instrument No. 3669/1981. You are requested to proceed with the works as more clearly specified under the above clauses without any delay. Failure of which I will resort to all remedies at law and in equity against you without further reference to you.

Apparently, there was no reply to this letter from the defendant. According to the plaintiff, under the supplementary agreement the defendant should have completed construction of the shophouses on or before 18 February 1983. The defendant did not complete such construction. The situation remained static and so on 16 August 1984, the plaintiff wrote again to the defendant reminding him of his obligations under the agreements and claiming the amount of RM51,000 as liquidated damages for delay in performing those obligations. This was soon followed by another letter dated 13 September 1984 written by Messrs. Ee & Lim, Advocates, Kuching, on behalf of the plaintiff. This is reflected on p. 19 of the bundle of documents. The relevant parts therein state:

We are now instructed by our client that despite repeated demands you have failed to carry out your obligations under the said two agreements particularly clauses 2 and 3 of the supplementary agreement.

In the circumstances and without prejudice to our client's right of action against you for damages for breaches of the said agreements, we are authorised and instructed by our client to and we do hereby give you notice that you are required to comply with the terms of the two said agreements and particularly to carry out the conditions stipulated in the letter of the Lands & Surveys Department (Ref. No. 18/TP/3 - SUDC/6/80) dated 25 February 1981, a copy of which is annexed hereto, and to obtain the approval of the relevant authorities in respect of the building and engineering plans necessary for the development of our client's said land within three (3) months from the date hereof.

Take Notice that by this letter our client is making time of the essence of the two said agreements.

By reason of the above letter, the defendant was given a 3 month notice to comply with the terms of the agreements, more specifically, the conditions stated in the approval letter dated 25 February 1981 issued by the Lands & Surveys. It is also to be noted that time was made of the essence of the agreements. The defendant replied through a letter dated 22 November 1984 (see p. 21 of the bundle of documents) which states:

Dear Sir,

I refer to your letters dated 16 August 1984 and 13 September 1984 with reference No. LCE/380/84.

Please be informed that work has already commenced on your land in that earth-fill had

> already (sic) and boundary had already been pegged although plans have not been officially approved.
>
> If you will refrain from demanding delay compensation which is disputed and get Chua Hock Teck's letter of administration ready, I shall continue my work on your land.

From the above letter, it would appear that up to 22 November 1984, the defendant had merely completed earth-filling of the plaintiff's land and pegging of the boundary thereof, but as yet, there was still no final official approval being obtained from the Lands & Surveys or the local council regarding the building and engineering plans. This position apparently continued until 27 December 1984 when the plaintiff, after the lapse of the 3 month notice, wrote to the defendant through his solicitors Messrs. Ee & Lim Advocates rescinding the agreements, the relevant paragraphs therein state:

> We are instructed by our client that you have failed to diligently proceed with and have not faithfully observed or complied with the terms of the development agreement dated 26 September 1979 and the supplementary agreement dated 19 June 1981.
>
> We are further instructed that despite our notice to you dated 13 September 1984 you have not changed your attitude and have not shown any urgency in this matter.
>
> We are now instructed by our client that in the circumstances he is compelled to terminate the said agreements he has entered into with you.
>
> We are now instructed and authorised by our client to and we do hereby give notice on behalf of our client that the said development agreement dated 26 September 1979 and the supplementary agreement dated 19 June 1981 entered into by you and our client are hereby rescinded but without prejudice to our client's right to claim damages against you for antecedent breaches of the said agreements.

It would seem from the testimony of the defendant that notwithstanding the rescission by the plaintiff, he (the defendant) continued to liaise with the Lands & Surveys and it was not until sometime in 1985, that the engineering plans were approved but ostensibly by then the plaintiff had commenced legal action against him. Certainly, the plaintiff had already rescinded the agreements.

In this case, the defendant has disputed the validity of the rescission contending in effect that during the period from the alleged expiry date on 18 February 1983 when the construction of the shophouses should have been completed, up to the date on 13 September 1984 when the letter of notice was served on the defendant, the plaintiff had signed letters of consent and the draft plan and had proceeded to dismantle his house and thereafter handed over possession of his land to the defendant. He contends that by those acts, the plaintiff must be taken to have waived any reliance on the time frame provided for under the supplementary agreement. I quite agree. I think the series of actions taken by the plaintiff during the said period between 18 February 1983 and 13 September 1984 which appeared not to have been disputed must have the effect of estopping him from invoking and relying upon those time restriction provisions in the supplementary agreement. In this connection, it is pertinent to refer to the case of *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading* [1972] 1 MLJ 21 where the brief facts are that the plaintiff firm had claimed damages for breach of contract concerning delivery of a certain machinery. In the written contract, it was stipulated that shipment of the said machinery should be made during July 1968. The machinery was not so shipped but the manager of the plaintiff firm entered into negotiations with the defendants. No notice fixing reasonable time for the shipment and the delivery of the machinery was given before the plaintiffs brought the action claiming damages. It was held as follows:

> The plaintiffs had waived the initial stipulation making time the essence of the contract. If they wanted to make time again of the essence of the contract they should have given the defendants a notice fixing a reasonable time for the shipment and delivery of the machinery. As no such notice had been given, the action was misconceived and premature.

Therein the Court cited with approval the *dictum* of Sir R. Malins VC in *Webb v. Hughes* [1870] LR 10 281 at p. 286 who said *inter alia:*

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a

> purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated.

The above *dictum* was also approved by Raja Azlan Shah J. (as he then was) in *Wong Kup Sing v. Jeram Rubber Estate Ltd.* [1969] 1 MLJ 245. Although the cases cited above related to contracts of sale, the same principle would apply to contracts for work and labour: see *Charles Richards Ltd. v. Oppenheim* [1950] 1 All ER 420. The law as to contract for the performance of work is stated in **Halsbury's Laws of England**, Hailsham Edn., Vol. 3, pp. 220 - 222. At p. 222, paragraph 380, the law is stated in this way, and I think it is applicable to our case:

> In cases where time has not been made of the essence of the contract or where, although time originally was of the essence of the contract, the time so fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer has still a right by notice to fix a reasonable time for the completion of the work, and, in case the contract does not complete by that time, to dismiss the contract, just as a vendor would be entitled to rescind the contract in case of a contract for sale of land.

This passage was cited with approval by Singleton LJ in *Charles Richards Ltd., supra.* What is a reasonable time is of course a question of fact to be decided on the circumstances of each case: per Mohamed Azmi J. in *Sharikat Eastern Plastics Industry, supra.*

In the instant case, the plaintiff, by a letter dated 13 September 1984 through his solicitors Messrs. Ee & Lim Advocates, had expressly and specifically given notice to the defendant to comply with the terms and conditions of the supplementary agreement and making time of the essence of the said agreement. The question is whether that notice was a reasonable one under the circumstances. There is incontrovertible evidence that the defendant was (presumably still is) a building draftsman at all material times. He had undertaken many other projects similar in nature to the one he had with the plaintiff. He would therefore be familiar with the procedures and the time factors involved in such projects. It was against this backdrop that he entered upon the terms and conditions in the supplementary agreement. A period of about 42 months had lapsed between the date of execution of the supplementary agreement on 19 June 1981 and the date of rescission on 27 December 1984. There is evidence, which I accept, that the plaintiff had quite consistently prevailed upon the defendant to obtain the relevant approval in compliance with the approval letter dated 25 February 1981 issued by the Lands & Surveys and to commence construction of the shophouses in accordance with the time schedules provided for under the said agreement. The plaintiff had also issued several warnings that legal action would ensue if the delays continued. Notwithstanding these, the defendant had not responded positively and had persisted in the delays. No approval was obtained and there was no or no substantial construction in sight. Furthermore, the defendant did not see fit to apply for extension of time etc. to comply with the agreed terms and conditions. It was in the light of these factors that the plaintiff issued the 3 month notice *vide* letter dated 13 September 1984 to the defendant, the relevant portions therein have already been alluded to earlier. For these reasons and on the evidence, I am of the view that the said notice was a reasonable one in all the circumstances. I therefore hold and declare that the development agreement of 26 September 1979 and the supplementary agreement of 19 June 1981 entered into between the plaintiff and the defendant had been lawfully and validly rescinded. For the same reasons and on the evidence in totality, I further hold that the defendant has not succeeded in his counter-claim against the plaintiff and I therefore dismiss it with cost.

The plaintiff has claimed for damages amounting to RM117,920 which is computed as follows:

(1) RM69,000 liquidated damages computed on the basis of 2 shophouses at RM1,500 per shophouse per month or part thereof from 19 February 1983 to 27 December 1984;
(2) RM4,920 loss of rental from a house and
(3) RM44,000 value of the plaintiff's wooden house before it was dismantled.

Under clause 1(i) of the supplementary agreement, the defendant was required to complete constructions within 15 months from date of approval of all relevant building plans failing which liquidated damages at the rate of RM1,500 for each unit of the plaintiff's 2 shophouses left uncompleted for each month or part thereof, shall be payable by the defendant to the

plaintiff. According to the plaintiff and this was not disputed, the due date for completion of all constructions was on or before 18 February 1983. I would accept this piece of evidence. From this date up to the date of the rescission letter dated 27 December 1984, there is a lapse of 23 months. Therefore the amount computed on the basis of clause 1(i) aforesaid would be RM69,000. I would accept this amount prayed for by the plaintiff.

As regards the claim of RM4,920 for loss of rental, there is merely the evidence of the plaintiff that he rented out his house to a tenant for RM410 per month. No receipt had been produced nor was the tenant called to give evidence on this score. Notwithstanding the non-denial by the defendant on this matter, it is still incumbent on the plaintiff to establish the claim strictly as it is in the nature of special damages. I do not think he had done so. Furthermore, there is nothing in the agreements providing for such a claim. In the circumstances, I will disallow this claim completely.

I come to the last claim for RM44,000 relating to the loss in value of the wooden house belonging to the plaintiff before it was dismantled. Since there is nothing in the agreements allowing for such a claim, I do not think it appropriate to grant it. However, clause 3(5) of the development agreement seems to indicate that the defendant should bear the costs and expenses of dismantling the plaintiff's house but in this case, the house was actually dismantled by the plaintiff for which he incurred the sum of RM2,000. The plaintiff was able to sell the salvaged materials from the house for the sum of RM6,000. The defendant has maintained that he had paid the plaintiff the sum of RM1,300 for expenses incurred in dismantling the house. I am prepared to accept this. In the circumstances, the balance owing to the plaintiff is RM700. I will therefore allow this amount of RM700 to the plaintiff.

In summary therefore the total amount to be entered for the plaintiff is RM69,000 + RM700 = RM69,700 with interest at the rate of 8% per annum from the date of judgment until date of realisation. Costs to be taxed.

MEDFICHE SDN. BHD.

v.

PERSATUAN TEKNOLOGI MALAYSIA

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
CIVIL SUIT NO. 12-25-92
[3 DECEMBER 1992]

APPEAL: Appeal against the decision of the Sessions Court Judge dismissing the defendant's application to set aside the plaintiff's writ of distress before the auction date.

LANDLORD AND TENANT: Plaintiff claimed for vacant possession and double rental under s. 28(4)(a) of the Civil Law Act 1956 - Tenant holding over - Distress suit filed - Whether s. 5(1) of the Distress Act allows only single rental to be distrained for.

The plaintiff had instituted a civil suit [C.S.No 22-446 of 1992] against the defendant for vacant possession from 1 April 1991 and for double rental thereafter. The defendant continued to hold over without paying any rent whatsoever and the plaintiff then filed Distress Suit S54-24-91 and obtained a writ on 13 February 1992. The defendant applied to set aside the writ before the Sessions Court and failed. In the appeal to the Judge, the defendant contended that only single rental could be distrained for under s. 5(1) of the Distress Act and that double rental was in fact damages which were in the Court's discretion. The plaintiff argued that when rent was in fact due from a tenant, a claim in distress over the amount that was lawfully due does not vitiate the distress. The goods seized by the bailiff were valued at less than RM1,000.

Held:

[1] Rental was in fact due to the plaintiff from May 1991 to December 1991 and right up to the date of the decision on 29 May 1992, totalling up to RM21,000. The defendant's submission amounts to him stating that the plaintiff was claiming more than what was lawfully due to him. However, since the defendant did not even tender the amount which according to him was lawfully due, he is estopped from contending that the distress was illegal. An amount over claimed does not vitiate a distress. The tenant must seek relief in damages or rescue for any amount alleged over claimed.